



IN THE MATTER OF:

MARVIN BANKS.

Complainant,

and

RAILWAY LIVERY & TAXI, LTD.

Respondent.

Charge No.: 2003CF1031

EEOC No.: 21BA30116

ALS No.: 04-033

RECOMMENDED ORDER AND DECISION

On February 17, 2004, the Illinois Department of Human Rights filed a complaint on behalf of Complainant, Marvin Banks. That complaint alleged that Respondent, Railway Livery & Taxi, Ltd., discriminated against Complainant on the basis of a physical handicap when it discharged him. Respondent never appeared to contest the allegations of the complaint. As a result, on June 1, 2004, pursuant to Complainant's motion, Respondent was found to be in default.

After the default finding was entered, a damages hearing was scheduled. Although Respondent was served with a copy of the scheduling order, nobody appeared on Respondent's behalf at the hearing. Complainant appeared with his counsel and put on his evidence. Subsequently, Complainant filed a motion for attorney's fees. Despite being served with a copy of that motion, Respondent filed no response. The time for filing such a response has passed. The matter is ready for decision.

FINDINGS OF FACT

The following facts were derived from the record file in this matter and from the evidence presented at the damages hearing held in this matter.

1. On or about August 4, 1997, Respondent, Railway Livery & Taxi, Ltd., hired Complainant, Marvin Banks, as a Driver.

2. Complainant has sickle cell anemia. That condition did not affect Complainant's ability to perform his job duties with reasonable accommodation.
3. Respondent was aware of Complainant's physical handicap.
4. On or about October 5, 2002, Respondent discharged Complainant.
5. Respondent discharged Complainant because of his handicap.
6. At the time of his discharge, Complainant was earning \$719.83 per month.
7. Complainant has not been able to find work since his discharge.
8. Complainant's physical handicap is aggravated by emotional distress. As a result, his discharge affected him more severely than otherwise would have been the case.
9. Complainant should be compensated in the amount of \$5,000.00 for the emotional distress caused by Respondent's actions.
10. Complainant does not desire reinstatement to his position with Respondent.
11. Complainant is seeking compensation for the work of attorney Andrew Levenfeld at the rate of \$250.00 per hour for 21.1 hours.
12. The requested hourly rate and the requested number of hours are reasonable and should be accepted.

CONCLUSIONS OF LAW

1. Complainant is an "aggrieved party" as defined by section 1-103(B) of the Illinois Human Rights Act, 775 ILCS 5/1-101 *et seq.* (hereinafter "the Act").
2. Respondent is an "employer" as defined by section 2-101(B)(1)(b) of the Act and is subject to the provisions of the Act.
3. Because it has been found in default, Respondent has admitted the allegations of the complaint in this matter.
4. Because of its failure to file an objection to Complainant's request for attorney's fees, Respondent has waived its right to object to such fees.

5. Complainant waived his right to reinstatement.

DISCUSSION

The complaint in this matter was filed on February 17, 2004. Respondent never appeared for scheduled status hearings or took any other action to defend itself in this action. Therefore, on June 1, 2004, Respondent was found to be in default.

As a result of the default finding, Respondent is deemed to have admitted the allegations of the complaint. ***Bielecki and Illinois Family Planning Council***, 40 Ill. HRC Rep. 109 (1988). Those allegations establish that Respondent violated the Act by discriminating against Complainant on the basis of a physical handicap, sickle cell anemia. Accordingly, a finding of liability against Respondent is appropriate. The only remaining issues involve Complainant's damages.

A prevailing complaint is presumed to be entitled to reinstatement to the job lost due to unlawful discrimination. However, at the damages hearing, Complainant explicitly stated that he does not want to return to work for Respondent. Therefore, he has waived his right to reinstatement and reinstatement is not recommended.

In lieu of reinstatement, Complainant requested an award of one year's front pay. That request should not be granted. Front pay is rare in this forum and generally has been limited to situations where reinstatement is impossible or extremely difficult, not where it is simply not preferred. The record in this case does not support an award of front pay.

On the other hand, Complainant is entitled to an award of backpay. At the time of his discharge, Complainant was earning \$719.83 per month. He had been out of work for approximately twenty-one months at the time of the damages hearing. If Complainant had been working for Respondent during that time, he would have earned \$15,116.43. Since he was unable to find another job, that figure is the recommended backpay award.

Because of the delay in Complainant's receipt of the backpay due to him, prejudgment

interest is necessary to make him whole. It is recommended that he receive such interest on the backpay award.

The Human Rights Commission presumes that recovery of pecuniary losses generally is enough to compensate a prevailing complainant for any emotional distress. See ***Smith and Cook County Sheriff's Office***, 19 Ill. HRC Rep. 131 (1985). However, in this case, Complainant has demonstrated that his emotional distress was significantly more intense than what is normally experienced by someone who is denied employment because of unlawful discrimination. Complainant's physical handicap is aggravated by emotional distress. He testified at the damages hearing that he was hospitalized shortly after his discharge and that the distress from his discharge was a factor in that hospitalization. Accordingly, he should receive appropriate compensation. It is recommended that Complainant be awarded \$5,000.00 as compensation for emotional distress.

Although he did not specifically request them at the damages hearing, there are two other types of relief that are appropriate in this situation. Respondent should be ordered to clear Complainant's personnel records of any reference to this action or to the underlying charge. In addition, Respondent should be ordered to cease and desist from further unlawful discrimination on the basis of physical handicap.

Finally, Complainant is entitled to an award of his reasonable attorney's fees. The standards for analysis of a motion for attorney's fees are explained in the case of ***Clark and Champaign National Bank***, 4 Ill. HRC Rep. 193 (1982). Under ***Clark***, Complainant must first establish that the hourly rate he seeks is appropriate. Then, he must establish the number of hours reasonably expended on the case.

Complainant is seeking compensation for the work of attorney Andrew Levenfeld at the rate of \$250.00 per hour for 21.1 hours. Mr. Levenfeld has been licensed to practice law in Illinois for over thirty years and he has considerable experience in employment litigation. Both

the requested hourly rate and the requested number of hours appear to be reasonable. Moreover, although Respondent was served with Complainant's motion for fees, there was no response to the motion. Thus, Respondent has waived the issue of attorney's fees. ***Mazzamuro and Titan Security, Ltd.***, ___ Ill. HRC Rep. ___, (1989CN3464, October 21, 1991). As a result, it is recommended that Complainant's fee request be granted in its entirety. The recommended attorney's fee is \$5,275.00.

RECOMMENDATION

Based upon the foregoing, it is recommended that the complaint in this matter be sustained and that an order be entered awarding the following relief:

- A. That Respondent pay to Complainant the sum of \$15,116.43 for lost backpay;
- B. That Respondent pay to Complainant prejudgment interest on the backpay award, such interest to be calculated as set forth in 56 Ill. Adm. Code, Section 5300.1145;
- C. That Respondent pay to Complainant the sum of \$5,000.00 as compensation for the emotional distress suffered by Complainant as a result of Respondent's actions;
- D. That Respondent pay to Complainant the sum of \$5,275.00 for attorney's fees reasonably incurred in the prosecution of this matter;
- E. That Respondent clear from Complainant's personnel records all references to the filing of the underlying charge of discrimination and the subsequent disposition thereof;
- F. That Respondent cease and desist from further unlawful discrimination on the basis of physical handicap.

HUMAN RIGHTS COMMISSION

BY: _____
MICHAEL J. EVANS
ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

ENTERED: August 30, 2004